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IN THE

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, in a suit brought by minority plaintiffs to compel compliance with the preclearance provisions of the Voting Rights Act, 42 U.S.C. §1973c, a district court may, after an objection on the merits has been entered by the Attorney General under Section 5 of the Act to statutes creating superior court judgeships elected at-large under majority vote and numbered post requirements, stay the effectiveness of that objection and allow the State to seek alternative, judicial preclearance free of any consequences of its violation of law.

2. Whether a district court may permit a state to continue implementation of unenforceable judicial statutes, including permitting incumbents to remain

indefinitely in unprecleared judgeships and allowing the appointment of new judges to unprecleared vacancies, after an objection has been entered by the Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

PARTIES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

TYRONE BROOKS, et al.,

Appellants,

vs.

GEORGIA STATE BOARD OF ELECTIONS, et al.,

Appellees.

OPINIONS BELOW

The memorandum opinion and order of the three-judge panel of the United States District Court for the Southern District of Georgia granting plaintiffs summary judgment and interim injunctive relief on the issue of whether or not the creation of elected judgeships is a covered change under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, is unreported and is reproduced in the separately bound appendix at 1a.

The order of May 29, 1990 which granted defendants' motion for reconsideration, modifying portions of the court's injunctive order, is unreported and is reproduced at 86a. A previous order denying defendants' motion for reconsideration without prejudice is reproduced at 84a.

The corrective order further modifying the injunctive relief, entered June 25, 1990, is reproduced at 96a.

The order denying plaintiffs' motion for a stay pending appeal is reproduced at 101a. All of these orders are unreported.

JURISDICTION

This is an appeal from the orders of a three-judge district court permitting continued implementation of statutes creating elected superior court judgeships. The statutes have not been

precleared as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The three-judge court was convened pursuant to 28 U.S.C. §2284, as required by 42 U.S.C. §1973c. A final order was entered on May 29, 1990. Appellants' notice of appeal was filed June 14, 1990 in the district court. 99a.

This Court is authorized to hear this appeal by 28 U.S.C. §1253 and 42 U.S.C. §1973c.

STATUTORY PROVISION INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The text of this section is reproduced at 125a.

STATEMENT OF THE CASE

The Unprecleared Judicial Election Statutes. Between 1965 and 1988, Georgia enacted statutes creating 77 judgeships of the superior court, as well as five new circuits. These statutes created the positions, prescribed the method of election, and (in the case of the new circuits) changed the boundaries of the election districts.

With these statutory additions, there are 45 judicial circuits in the State of Georgia from which superior court judges are elected. Although the state is 26.8% black, each of the 45 circuits has a majority white voting age population. Circuits are composed of one to eight counties. Superior court judges in Georgia are elected at-large by all electors within the judicial circuit, using numbered posts and a majority vote

requirement. Only five of the 135 sitting superior court judges are black.

Georgia is a covered jurisdiction under the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Any change in a standard, practice or procedure with respect to voting is required by the Act to be precleared by the Attorney General of the United States or the District Court for the District of Columbia before the change may be lawfully implemented.

Despite this requirement, Georgia implemented each of the 77 statutes at issue without first obtaining preclearance. Positions were established, judges were appointed, elections were conducted and vacancies were filled, all without complying with Section 5.

On June 23, 1986, this Court determined that changes in the number and

the manner of election of judges are changes requiring preclearance under Section 5 of the Voting Rights Act. Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985) (3 judge), summarily aff'd 477 U.S. 901 (1986). However, Georgia continued its implementation of its unprecleared judicial statutes, filling ten additional positions and holding judicial elections in 1986 and again in 1988. All of the unprecleared judgeships are held by incumbents who were appointed or elected after Haith v. Martin was decided.

It was not until June 27, 1988 that the State submitted any of the judicial election changes for preclearance. Presented, by law, with a choice between administrative preclearance (through the Attorney General) and judicial preclearance (in the District Court for the District of Columbia), the State chose to

submit the changes to the Attorney General.

The Administrative Preclearance Process: Round One. On August 26, 1988, the Attorney General precleared 30 of the judgeships and three of the five new circuits. As to the remaining 48 judgeships and two judicial circuits, the Attorney General (in accordance with 28 C.F.R. §51.37) requested that the State provide additional information, to enable him "to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race of color." 116a. Instead of providing the requested information, the State unilaterally decided not to comply with the preclearance requirements, and so advised the Attorney General. On June 16,

1989, the Attorney General interposed an objection to "the further implementation of the changes concerning the election of superior court judges," consistent with the regulations, which provide that failure to complete the submission may result in objection. 28 C.F.R. §51.40. 119a.

Plaintiffs, who are black citizens and registered voters of Georgia and who had filed suit on July 13, 1988, challenging the implementation of statutes creating new superior court judgeships and circuits in Georgia without first obtaining preclearance under Section 5,[1]

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[1] Plaintiffs also challenged the method of electing superior court judges (both those created prior to the effective date of the Voting Rights Act and the unprecleared judicial statutes) as violative of Section 2 of the Act, 42 U.S.C. §1973, and the first, thirteenth,

moved for a preliminary injunction and summary judgment. A three-judge district court was convened pursuant to 28 U.S.C. §2284 and 42 U.S.C. §1973c. On December 1, 1989, the court held that the addition of judgeships was a covered change under Section 5, and that Georgia had implemented 48 judgeships between 1964 and 1988 without first obtaining preclearance. Accordingly, it entered an order granting plaintiffs' motion for summary judgment.

In weighing what preliminary relief to enter, the court noted that

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(Footnote 1 cont.)

fourteenth and fifteenth amendments to the United States Constitution. None of these claims has been decided below and none present any issue for decision in this appeal. Proceedings in the Section 2 portion of the case were stayed pending resolution of the Section 5 claim.

> We would do violence to the heart of Section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding Section 5 for a long time. Moreover, Supreme Court precedent in this area is unambiguous. Allen v. State Board of Elections, 393 U.S. 544, 571, 89 S.Ct. 817, 834; United States v. Sheffield Board of Commissioners, 435 U.S. [100,] 136, 98 S.Ct. at 981; McCain v. Lybrand, 465 U.S. [237,] 249-51, 104 S.Ct. at 1045-46. Section 5 means what it says: absent preclearance, a covered change may not be enforced.

32a-33a. Relying on Berry v. Doles, 438 U.S. 192 (1978) and NAACP v. Hampton County, 470 U.S. 179 (1985), the court first gave the defendants thirty (30) days within which to comply fully with the Attorney General's request for additional information. In the event defendants failed to do so or the Attorney General entered an objection on the merits, the court concluded that it "must afford some affirmative relief." 40a. Rejecting the State's argument that the court was

drastically expanding the law, the court explained,

> Section 5 is a drastic remedy imposed on the states to remedy extraordinary wrongs.

29a.[2] See also South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (referring to Section 5 as an "uncommon exercise of congressional power").

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[2] The court also noted that the State itself was responsible for the brink on which it stood:

> ...the State has pointed to no authority to suggest that Section 5 does not apply to the election of judges, nor has the State been able to show that the addition of judges is not a covered change within the scope of Section 5. By the same token, the State has failed to adduce any precedent that might justify its deliberate decision not to comply with the Attorney General's request for information, a decision that has forced us ineluctably to take the steps we have here.

45a.

Despite its recitation of strong Supreme Court precedent, the relief the court afforded was limited.[3] It enjoined any further elections or appointments to unprecleared positions. However, the court declined to declare the judgeships void "until the date of the next scheduled election" for the position (in some cases, more than two years hence), exercising what it believed to be its "equitable discretion to permit incumbents to serve out their full terms," even in the event preclearance were denied. 41a.

The Administrative Preclearance Process: Round Two. As a result of the court's December 1, 1989 order, the State

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[3] Even the dissenting member of the court characterized the remedy as a "relatively mild form of relief." 76a.

provided supplemental information to the Attorney General,[4] and submitted statutes from the 1989 and 1990 legislative sessions, creating ten (10) additional judgeships, for preclearance. It also immediately moved for reconsideration, which was denied without prejudice pending the Attorney General's decision. 84a.

On April 25, 1990, the Attorney General entered an objection on the merits to each of the 58 additional superior court judgeships, holding that the State

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[4] Although it submitted the requested information to the Attorney General, Georgia took no action to correct the objectionable features of the method of electing judges at its annual legislative session, which commenced in January of 1990. Instead, it added five new judgeships, elected using the same election features. To date, the State has not taken any action to cure the violations found by the Attorney General in his letter of April 25, 1990.

had not "carried its burden of showing that the expansion of an electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships" had "neither a discriminatory purpose nor a discriminatory effect." 110a, 111a. Specifically, the Attorney General found that

> the majority vote and designated post requirements...acting in tandem, tend to minimize black voting strength in an at-large system. See, e.g., City of Rome v. United States, 446 U.S. 156 (1980). Indeed, there is substantial information indicating that the majority vote requirement was adopted in 1964 by the state precisely for that invidious purpose; the designated post requirement was adopted in the same legislation...
>
> In addition, the state has not shown how its interests are served by circuit-wide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act. Thornburg v. Gingles, 478 U.S. 30 (1986).

108a-109a.

The State renewed its motion for

reconsideration, asking that the judges be permitted to remain in office while the State (having been denied preclearance by the Attorney General) sought judicial preclearance in the District Court for the District of Columbia. The motion was opposed by the plaintiffs and by the United States, appearing as amicus curiae.

On May 29, 1990 the court modified its remedial order, vacating all aspects of its previous remedy other than prospective injunctive relief.[6] The new order permits sitting judges to remain in unprecleared offices indefinitely, beyond the end of their terms, and allows the

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[6] The order bars any elections for the unprecleared posts (elections for 1990 were cancelled), and prevents the state from implementing the ten (10) newly enacted, but not yet implemented, judgeships.

State to fill any vacancies in these judgeships by appointment until a new electoral scheme is precleared and implemented. Even in the event preclearance is denied by the District Court for the District of Columbia, the unprecleared judges are to continue to serve for five additional months (150 days). 89a. Finally, the State was given 90 days, until September 23, 1990 merely to file its declaratory judgment action. 97a-98a.[7] The sole ground given by the court for the modification was to "assure that the defendants will be able to seek judicial review of the statutes without

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[7] The State has not rushed to file suit. At the time of filing this jurisdictional statement, more than three months have elapsed since the Attorney General's objection and no suit has been filed in the District Court for the District of Columbia.

the risk of serious disruption of Georgia's judiciary." 88a.

Plaintiffs filed a notice of appeal on June 14, 1990, together with a motion for stay, which was denied on June 22, 1990. That same day, defendants filed a notice of appeal. Plaintiffs' Application for Injunction Pending Appeal was denied by Justice Kennedy on July 13, and is currently pending before Justice White.

THE QUESTIONS ARE SUBSTANTIAL

Never before has a court been permitted to stay the effectiveness of an objection entered by the Attorney General under Section 5 of the Voting Rights Act.[8] By removing all affirmative relief after an objection on the merits, to allow Georgia to seek seriatum what Congress designed as an alternative method of preclearance, the district court "shift[ed] the advantage of time and inertia from the perpetrators of the evil

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[8] Only once before has a court even entered such an order. In Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981), the three-judge court allowed defendants to enforce previously objected-to annexations while they sought reconsideration from the Attorney General. This Court granted plaintiffs an injunction pending appeal, essentially reversing the district court, and holding the annexations to which the Attorney General had objected unenforceable in pending elections.

[of discrimination in voting] to its victims," South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966), contrary to both the intent of Congress in adopting Section 5 and to the holdings of this Court.[9]

The commands of the Voting Rights Act are unambiguous. Unprecleared voting changes are null and void. Hathorn v. Lovorn, 457 U.S. 255, 270 (1982); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Board of Elections, 393 U.S. 544, 572 (1969). If the jurisdiction and the voting practices are covered by Section 5, and if there has been no preclearance, the voting changes may not continue to be

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[9] Georgia is entitled to pursue both preclearance avenues. However, having received an objection form the Attorney General, they are not entitled to a stay of that objection while pursuing judicial preclearance.

enforced. McCain v. Lybrand, 465 U.S. 236, 245 (1984); Georgia v. United States, 411 U.S. 526, 541 (1973); Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981); Holt v. City of Richmond, 406 U.S. 903 (1972).

The district court was required to enforce the Voting Rights Act and grant affirmative relief to plaintiffs. It had no discretion to permit continued implementation of the unprecleared statutes after an objection by the Attorney General. Its order, if permitted to stand, will seriously undermine future compliance with the requirements of Section 5, by removing any incentive to preclear covered voting changes. Review and reversal by this Court are urgently required.

I. THE DISTRICT COURT'S ORDER VACATING ALL BUT PROSPECTIVE RELIEF WHOLLY SUBVERTS CONGRESS' INTENT IN ENACTING THE PRECLEARANCE REQUIREMENTS OF THE VOTING RIGHTS ACT

Section 5 of the Voting Rights Act was designed to "shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." South Carolina v. Katzenbach, 383 U.S. 301, 328; Perkins v. Matthews, 400 U.S. 379, 396 (1971). Finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and emergy required to overcome the obstructionist tactics invariably encountered in these lawsuits," Congress exercised its authority under the Fifteenth Amendment to "prescribe[] remedies for voting discrimination which go into effect without any need for prior

adjudication." Id., at 327-28. Accord, McCain v. Lybrand, 465 U.S. 236 (1984).

The most stringent of these remedies is the preclearance requirement. No covered jurisdiction may implement any change affecting voting without first demonstrating to the satisfaction of either the Attorney General or the United States District Court for the District of Columbia that the proposed change does not have the purpose, and will not have the effect, of discriminating against minority voters. 42 U.S.C. §1973c.

Voluntary compliance with the preclearance provisions is key to its operation as an effective protection of minority voting rights. It is crucial, therefore, that when jurisdictions violate Section 5, and implement covered changes without preclearance, the consequences are swift and sure. As the district court

noted in its December 1, 1989 opinion, Supreme Court precedent to date has made it plain that "Section 5 means what it says: absent preclearance, covered changes may not be enforced." 33a.

The district court's order vacating all affirmative relief, and permitting continued and indefinite implementation of unprecleared judgeships, cuts out the very core of Section 5. The order sanctions the state's violation, and insulates Georgia from any consequences of its illegal implementation. The very gravaman of the State's request for reconsideration of the preliminary injunction was that if the law were enforced, the State would be disadvantaged in litigation. The State argued that if the court did not protect the State by keeping the judges in office no matter what the State did or how slowly it moved, the State might feel required to

"capitulate" to the ruling of the Attorney General of the United States.[10]

The order of May 29, 1990 which directed that the unprecleared judicial offices shall continue indefinitely removes any incentive to the State to cease the violation or adopt a method of election that does not violate Section 5.

The three-judge court improperly

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[10] Despite its argument to the court that the State might feel compelled to capitulate if faced with the consequences of its actions, the state attorney general took the public position that they would litigate no matter what. At a press conference held the day after the Attorney General entered his objection on the merits, the State vowed to "spend whatever it takes to defend its system of electing Superior Court judges even if it means putting 25 or more sitting judges out of work." Georgia's Attorney General Michael Bowers was quoted as saying, "It could last for years. Is it worth a million dollars? Five million? I say yes." The Union Recorder, Friday, April 27, 1990, p. 3A.

placed the burden of voting rights enforcement back upon minority plaintiffs. This action is contrary to the Congress' intent as expressed in not only the 1965 Act, but also the 1970, 1975 and 1982 extensions. NAACP v. New York, 413 U.S. 345, 354 (1973)["voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago,'" quoting House Rep. No. 439, 89th Cong. 1st Sess. 11 (1965)], see also, Senate Rep. No. 162, pt. 3, 89th Cong. 1st Sess. 6-7 (1965); H.R. Rep. No. 97-227; S. Rep. No. 97-417, 97th Cong. 2d Sess. 5 (1982). Congress intended that submitting authorities -- not minority voters -- bear the burden of delay and disruption resulting from the actions of the states.

Equally fundamental, the order relegates the administrative preclearance process to a "second class status," and treats the Attorney General's objection, entered after careful review of materials submitted by both parties over a 23 month period, as a nullity. There is no basis either in the Act or judicial interpretation for such a de facto "stay" of the Attorney General's objection on the merits. Denial of administrative preclearance has the same legal effect, and is as fully binding as, denial of preclearance by the United States District Court for the District of Columbia. The court had no more authority to stay the Attorney General's objection than to stay an order of the District Court.

The district court's order of May 29, 1990 destroys any incentive a covered jurisdiction might have to comply with the

preclearance requirements of Section 5. The reward for violating the Act is to be permitted to continue to violate the Act. Because this order undermines the entire Congressional scheme for voting rights enforcement, the order should be reversed.

II. FEDERAL COURTS ARE REQUIRED TO GRANT INJUNCTIVE RELIEF AFTER AN OBJECTION ON THE MERITS BY THE ATTORNEY GENERAL

What constitutes an appropriate remedy for a Section 5 violation varies according to whether the change has been implemented and whether the jurisdiction has sought preclearance.

This Court has consistently granted applications for stay of a Voting Rights Act violation presented prior to implementation. See, e.g., Holt v. City of Richmond, 406 U.S. 903 (1972); Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981); Lucas v. Townsend, 486

U.S. 1301 (1988). The district court here correctly followed these precedents, and enjoined any implementation of the ten newest judgeships.

After an unprecleared change has been implemented, a court must exercise its discretion to determine the appropriate remedy. While an unprecleared change is presumed void, this Court has authorized district courts to consider, in formulating relief, such factors as "the nature of the changes complained of, and whether it was reasonably clear at the time of [implementation] that the changes were covered by Section 5." Perkins v. Matthews, 400 U.S. 379, 396 (1971). In some instances, it is appropriate to allow the covered jurisdiction thirty (30) days within which to apply for preclearance before imposing affirmative relief. See, e.g., Berry v. Doles, 438 U.S. 190, 192-93

(1978); N.A.A.C.P. v. Hampton County Election Commsn, 470 U.S. 166182 (1985).[11]

However, once a jurisdiction has been given the opportunity to obtain preclearance and either declines to do so or is denied preclearance, this Court has consistently required that full injunctive relief be granted, and the results of the illegal implementation undone. NAACP v. Hampton, supra, 470 U.S. at 182-83 ("If appellees fail to seek this approval, or if approval is not forthcoming, the

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[11] This Court has affirmed such limited relief where there were questions as to coverage (Berry v. Doles, Perkins v. Matthews) or a question as to whether preclearance had previously been granted (NAACP v. Hampton). While plaintiffs dispute that there was an open question as to either coverage or prior preclearance in the instant case, they do not here challenge the district court's decision to afford defendants thirty (30) days within which to complete their Section 5 submission.

results of the March 1983 election should be set aside"); Perkins v. Matthews, 400 U.S. 379, 397 (1971)(ordering a new election if local officials fail to seek preclearance or if the required federal approval is not forthcoming). See also Berry v. Doles, supra.

Such relief is particularly appropriate here where the Attorney General's denial of preclearance was grounded upon a finding of racial purpose. While "the determination whether a change has a discriminatory purpose or effect... is [ordinarily] distinct from the determination whether the failure to submit the change required that the election be set aside," Hampton, supra, 470 U.S. at 183, n. 36, the Attorney General, in the course of his Section 5 review, has here found "substantial information indicating that the majority vote requirement was adopted

in 1964 by the state...for [the] invidious purpose" of minimizing black voting strength. 108a.[12] As this Court noted in City of Richmond v. United States, 422 U.S. 358, 378 (1975), "an official action, ...taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our

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[12] The existence or absence of a finding of racial purpose was also a factor considered by this court in Allen v. State Board of Elections, 393 U.S. 544, 572 (1969), in determining the appropriate remedy for a Section 5 violation.

Another factor considered in Allen was the state's conduct. Mississippi, this court found, had not engaged in "deliberate defiance of the Act," but had merely raised a coverage issue of first impression, subject to rational disagreement. Id. By contrast, the history of this case is one of recalcitrance and delay. Georgia not only implemented covered changes without preclearance for years after this Court's ruling in Haith v. Martin, but also made a "deliberate decision not to comply with the Attorney General's request for information," without either precedent or authority. 45a.

Constitution or under the [Voting Rights Act]."

The district court, by allowing judges to remain indefinitely in unprecleared positions and by vacating its prior order declaring the positions void in the wake of the Attorney General's objection, has utterly failed to enforce the law. Precedent requires that the remedial order be reversed.

III. THE REMEDY REQUIRED IS AN ORDER DECLARING THE UNPRECLEARED JUDICIAL POSITIONS UNENFORCEABLE AND VACANT

It is now a matter of black letter law that voting practices covered by Section 5 which have not received preclearance may not continue to be enforced. See, e.g., McCain v. Lybrand, supra, 465 U.S. at 245; Georgia v. United States, 411 U.S. 526, 541 (1973); Canady v. Lumberton City Board of Education, 454

U.S. 957(1981); Holt v. City of Richmond, 406 U.S. 903 (1972).

Enjoining the objectionable practice has the result of reinstating the last valid plan in effect (the "status quo ante"). See City of Rome v. United States, 446 U.S. 156, 182 (1980). In the instant case, the judgeships did not exist prior to the enactment of the unprecleared statutes. Under Section 5, the judgeships themselves have no legal validity until the statutes are precleared, so there is no previous election plan to which the State could legally revert for these positions. The appropriate relief, therefore, is to declare all unprecleared positions vacant and void.[13]

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[13] Although the district court initially ordered a form of this relief in the event the Attorney General declined to

In the alternative, if plaintiffs are incorrect in the above, and if the Attorney General's objection is read as merely going to the method of electing these judges and not the positions themselves, the remedy entered by the three-judge court on May 29, 1990 is nonetheless legal error. If the objection is to the majority vote, numbered post and at-large features of the election system, then the proper relief is for the district court to adopt a racially fair interim election plan that squarely meets and cures the objections interposed by the

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(Footnote 13 cont.)

withdraw his objection, it erred in permitting the judges to remain in office until the end of their terms. Once the objection on the merits was entered, Perkins and Hampton require that the judgeships be immediately voided and vacated.

Attorney General. Upham v. Seaman, 456 U.S. 37 (1982). The State itself twice argued - in its Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, at pages 23-24, and in its Response to DOJ Letter of April 25, 1990, at p. 3 - that such a remedy would be appropriate relief. Remanding the case for the adoption of such a plan would more fully protect the interests of the minority plaintiffs than the present order.

CONCLUSION

The three-judge court, in vacating all but prospective injunctive relief after an objection on the merits and permitting judges elected to unprecleared posts under a discriminatory election system to remain in office indefinitely, ordered the least defensible remedy

possible. The order casts the burdens of delay onto the victims of discrimination, promotes time-consuming and expensive litigation, and rewards and encourages non-compliance with Section 5 in clear derogation of Congressional authority and intent. Accordingly, the remedial aspects of the district court's orders must be reversed and the case remanded for the entry of an appropriate and effective remedy.

Respectfully submitted,

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